No. 439

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

UNITED STATES OF AMERICA, APPELLANT

v.

THE BORDEN COMPANY ET AL.

On Appeal from the United States District Court for the Northern District of Illinois

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MOTION OF THE BORDEN COMPANY TO AFFIRM

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INDEX

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Appellee, The Borden Company, pursuant to Rule 16, of the Rules of the Supreme Court of the United States, moves that the final judgment of the district court sought to be reviewed in this case be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

Appellant's Jurisdictional Statement (herein called "J.S.") sets forth a single "Question Presented" (J.S. 2). The "Question" as stated is not, however, presented by the record as to this appellee. The only issues actually presented by the appeal are questions of fact arising out of the complex and lengthy cost justification studies presented by the two appellees. Not one of these fact questions is substantial; not one is important; and not one is apt to be presented in the same form in any other case.

HISTORY OF THE CASE

This is a direct appeal from the judgment of the district court taken pursuant to Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended. The judgment appealed from, entered February 27, 1961, denied the Government's request for an injunction against future violations of Section 2(a) of the Clayton Act.

The Government filed its complaint in this case more than ten years ago, on June 18, 1951, primarily charging several dairies in the Chicago area with violating Sections 1 and 2 of the Sherman Act, but incidentally including, in two of the forty-eight paragraphs of the complaint, a general charge of price discrimination in violation of Section 2(a) of the Clayton Act. At the close of the Government's case—which was devoted primarily to the Sherman Act charges—the district court granted defendants' motions to dismiss for failure of proof of the Sherman Act charges and for failure of the evidence on the Clayton Act charges to warrant the granting of the relief sought.

On appeal, this Court affirmed the dismissal of the Sherman Act charges, but reversed and remanded the case as to the Clayton Act charges "for further consideration" as to whether an injunction should in equity be granted. *United States* v. *Borden Co.*, 347 U.S. 514. On remand, the "sole question" was, as the district court phrased it, "whether, in light of *present* conditions in the milk industry in Chicago, as shown by the evidence presented to the Court after remand, the public interest would be served by the issuance of an injunction" (J.S. App. 24).

At the request of the Government, the record was reopened for evidence "of current Clayton Act violations" (J.S. App. 23). The Government introduced evidence of discount schedules used by Borden in the sale of its prod-

ucts to various classes of grocery customers; and evidence of a substantially different system of quotations by Bowman to grocery customers based on a different classification method from that used by Borden (J.S. App. 24-25).* Both Borden and Bowman submitted extensive and wholly independent studies to justify the resulting net price differentials to their customers on the basis of cost differences.

The ultimate conclusion reached by the district court upon this massive record was that "plaintiff has shown no need for the exercise of the Court's equitable powers and accordingly, the case must be, and is, hereby dismissed" (J.S. App. 38). As to the practices claimed to violate the Clayton Act which appeared in the evidence on the first trial, the district court found that such practices "apparently no longer are followed by the defendants" and that "The types of violations now alleged to exist are completely different from those described in the original complaint." The district court concluded that "No evidence was presented and no argument made that there is a *present* need for injunctive relief to cure such old practices," and that these old practices were in any event "condemned by the terms of the *Dean* decree" previously issued in private litigation by the same district court (J.S. App. 36-37). No attack is now made on these conclusions.

As to the new pricing practices shown by the evidence introduced on reopening, the district court found:

> "The various practices of which plaintiff *now* complains, consisting of alleged outright discrimination between classes of customers, are shown to have been

* Evidence of differences in prices charged restaurants, hotels, and similar "bulk wholesale customers" was also introduced, as to which cost justification defenses were offered and sustained (J.S. App. 25-26, 33-34). While the Notice of Appeal contained a "question" directed to this phase of the case, the Jurisdictional Statement abandons this issue (J.S. 2, fn. 1).

adequately justified by the defendants' cost studies" (J.S. App. 37).

The only attack now made by the Government on the decision below relates to this conclusion.

The Issues as to Borden and Bowman Are Separate and Distinct

While Borden and Bowman were joined in the original complaint as co-conspirators in violation of the Sherman Act, there was no allegation of any conspiracy to violate the Clayton Act, and thus nothing justified joinder with respect to the Clayton Act charges. When the Sherman Act charges were dismissed, and the dismissal was upheld by this Court, the only basis for joinder ceased to exist.

The pricing practices of the two dairies placed in evidence after remand were markedly different, and the cost justification evidence offered by each was wholly independent of the evidence offered by the other, both in form and in content. While for convenience the two cases were decided by a common opinion, the issues as to Borden and Bowman were treated throughout as separate and independent. Separate pre-trial orders were entered as to each defendant, and the evidence as to each was separately presented. The case as to neither appellee is dependent upon nor stands or falls with the case made for the other. As the Jurisdictional Statement makes clear, the Government's attack on the two cost justification defenses necessarily rests upon different bases.

For the reason that the appeal thus raises different issues as to the two appellees, and those issues must be presented separately to avoid confusion, separate motions to affirm are being filed.

Nature of the Evidence on Remand

On reopening, the Government's additional evidence as to Borden was set forth in stipulations which form a "Supplemental Pre-Trial Order" (herein called "SPTO-Borden"). Borden's extensive cost justification study was also reduced to stipulated form as an "Additional Pre-Trial Order" (herein called "APTO-Borden").

During the period of time covered by the Government's evidence, Borden published discount schedules applicable generally to grocery store customers based on quantities purchased. This schedule read in part:

> "The following discount schedule will be applied to all purchases of Borden's fresh milk products.
>
> | Average converted units per day | % Discounts |
> |---|---|
> | 0—24 | 0 |
> | 25—74 | 2 |
> | 75—149 | 3 |
> | 150 and over | 4" |
>
> (SPTO-Borden, Schedule A).

Of the 1,322 "independent" grocery stores covered by the cost study, 392 were entitled to no discount under this schedule, 573 to a 2% discount, 277 to a 3% discount, and only 80 to a 4% discount (APTO-Borden p. 126, and p. 163, Schedule XXXIV).

Borden also offered its two largest customers discounts of 8½% which was 4½% in excess of the maximum discounts set forth in the published schedule. Those two customers were the Great Atlantic and Pacific Tea Company and Jewel Food Stores, Inc. (hereinafter referred to as "A&P" and "Jewel"). Borden was not then selling milk to any other grocery store customer in the Chicago area who operated more than one store under common corporate ownership—or was, in other words, a corporate chain store (APTO-Borden p. 83, ¶ 145).

A&P and Jewel were many times over the largest grocer customers of Borden; together they purchased 66% of Borden's total sales of fluid milk to all grocery store customers in the Chicago area (APTO-Borden p. 163, Schedule XXXIV).

The extent of Borden's cost justification study is evidenced by the fact that the pre-trial order in which it is set forth (APTO-Borden) is 171 pages in length, contains 281 paragraphs of stipulated fact, identifies 63 individual exhibits and 13 "bulk" exhibits (constituting the basic data of the cost studies), and includes 34 schedules of computations.

The Government presented four expert witnesses in rebuttal of the cost study. The direct testimony of these witnesses as to the Borden study appears in statement form, with other material, in a "Rebuttal Pre-Trial Order" (herein "RPTO-Borden"). Cross-examination of these witnesses (Taggart, Sawyer, Otto F. Taylor, and Woolley) was by lengthy depositions filed as part of the record (herein called "T.D.," "S.D.," "O.F.T.," and "W.D."). Further stipulations were also contained in a "Final Pre-Trial Order" (herein "FPTO-Borden").

All of the stipulated facts set forth in these various pre-trial orders were embodied by reference in the district court's findings, as were the ultimate facts and conclusions stated in the memorandum opinion of the district court (J.S. App. 38). Specifically, the district court made this finding as to the cost studies:

> "I find that the cost studies provide an adequate justification for the difference in prices described above in defendants' published discount quotations" (J.S. App. 35-36).

Grounds for This Motion and Facts on Which It Is Based

This motion is based on two grounds: *first*, that the record as to Borden does not raise the "Question Presented" which the Jurisdictional Statement asks this Court to decide; *second*, that the only possible questions open for review involve issues of fact which are neither substantial nor important.

I. THE "QUESTION PRESENTED" SET FORTH IN THE JURISDICTIONAL STATEMENT IS NOT RAISED BY THE RECORD.

The single "Question Presented" set forth in the Jurisdictional Statement is phrased as follows:

> "Whether sellers of fluid milk who have engaged in prima facie unlawful price discrimination in favor of all chain stores and against all independents, regardless of the volume of their individual purchases, can justify the discriminations as making 'only due allowance for differences in the cost of . . . sale or delivery resulting from the differing methods or quantities' in which the milk is sold or delivered to the chains and the independents, merely by proving that sales to all chains are less costly *on the average* than sales to all independents, without showing any justification for treating the chains and independents as separate classes of purchasers" (J.S. 2).

Inherent in the "Question" as so stated are three basic assumptions, all contrary to the record:

> (1) that Borden engaged in "price discrimination in favor of *all* chain stores," large and small, "against *all* independents" solely because the favored customers were chain stores;
>
> (2) that Borden's cost justification was limited to proof "that sales to all chains are less costly *on the average* than sales to all independents"; and

(3) that Borden made *no* "showing" of "any justification for treating the chains and independents as separate classes of purchases."

A brief review of the record will show that all three assumptions are contrary to the record, and that the alleged "Question Presented" is thus not raised by the record.

A. The "Question Presented" does not arise because Borden did not grant maximum discounts to "all chain stores" as such and did not grant discounts simply because of an "arbitrary classification of customers according to ownership."

Amplifying the first assumption underlying the alleged "Question Presented," the Jurisdictional Statement asserts: (1) that "The Borden study . . . rests upon an arbitrary classification of customers according to ownership" (J.S. 16); and (2) that under the Borden pricing system "chain stores receive a fixed discount regardless of quantities purchased" (J.S. 6). Both assertions are clearly contrary to the record.

There is not a scrap of evidence that Borden granted its two largest customers larger discounts than other customers simply because they were "chain stores." To the contrary, the undisputed evidence shows that the basic reason was the volume of the purchases by each of these customers. The sales by Borden to A&P and Jewel were in total almost exactly double the total sales made by Borden to all its 1,322 so-called "independent" grocery store customers (APTO-Borden p. 163, Schedule XXXIV). The weekly purchases of these two customers combined were more than 8 times the total weekly purchases of the 80 largest "independent" grocery stores served by Borden (which were the stores entitled to the 4% discount under the published schedule) (*ibid.*). Thus, it is obvious that

not a single "independent" grocery store had total purchases that were more than a very small fraction of the purchases made by either Jewel or A&P.*

Furthermore, Borden did not publish or use any discount schedule listing "chain stores" as such. The Borden discounts to A&P and Jewel were granted in individual and independent letters written to these two customers (SPTO-Borden pp. 3-6, Ex. B, C, and E). There is not a scrap of evidence to show that, had other "chain stores" offered to purchase from Borden, they would have been granted the same discount.

The misunderstanding of the record as to Borden's pricing practices which is implicit in the wording of the alleged "Question" is further reflected by the assertion that Borden had made a "wholly arbitrary" classification "which precludes any independent from ever achieving or approximating the discount automatically accorded all chains, regardless of the volume of its individual purchases" (J.S. 18). This misunderstanding is further betrayed by the assertion that "the Schubert store" received no more than a 4% discount despite its volume of purchases (J.S. 17, fn. 12). To the contrary, the Government's own proof showed that at least three of the largest independent customers (Schubert, Popek, and Cartan), as well as A&P and Jewel, received discounts greater than those set forth in the published discount schedule. The effective discount to these three stores was 5½% as against the 4% maximum set forth in the published schedule (SPTO-Borden pp. 3-5, Schedules I and II). Hence, the assumption that Borden granted discounts reflecting volume and other

* That the purchases of Jewel and A&P were approximately of the same order of volume is apparent from RPTO Borden p. 26 and FPTO-Borden, Schedule XXXVI.

economies only to "chain stores" is thus rebutted by the Government's own proffered evidence.*

Even the term "chain stores" crept into the case as to Borden simply as a matter of descriptive convenience. The pre-trial order embodying the Borden cost study stated that, "for purposes of the cost study," customers served on the 134 wholesale routes covered by the survey were classified as follows: (1) stores of A&P and Jewel "will hereafter be called 'chain stores,'" (2) all other grocery stores "will hereafter be called 'independent stores'" (APTO-Borden p. 83, ¶ 145). In other words, the fact that the two customers making the bulk of the purchases and thus receiving the maximum discounts happened to be chain stores led to the use of the phrase in the cost study. Obviously, these customers were *not* granted the discounts simply because they could for convenience be described as "chain stores."

The irrelevance of the term "chain stores" as a classification of customers is emphasized by the fact that, on August 29, 1955, Borden lost the Jewel business to a competing dairy, Dean Milk Company (APTO-Borden pp. 3-4, ¶ 7). Thereafter, the single customer receiving the lowest net price was A&P.

The fact that Borden's two largest purchasers at the time of the cost study were corporations operating more than one grocery store may be the reason why the purchases of those corporations exceeded many times over the purchases of any other customer, and thus warranted special

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* No separate computation of the costs of serving these three customers was made by Borden (although the basic data from which such a computation could be made is in the record), since it was later stipulated that "plaintiff does not contend in this proceeding that the added discounts of 1½% allowed by Borden . . . to store customers Schubert, Popek, and Arthur Cartan . . . are evidences of a violation of Section 2(a) of the Clayton Act as amended" (APTO-Borden p. 171, ¶ 2).

discount consideration. But that fact does not in any way justify the Government's contention that Borden made "an arbitrary classification of customers according to ownership."

B. The "Question Presented" does not arise because Borden's cost justification was not limited "merely" to proof "that sales to all chains are less costly on the average than sales to all independents."

The "Question Presented" asks whether the appellees "can justify the discriminations . . . merely by proving that sales to all chains are less costly *on the average* than sales to all independents" (J.S. 2).

Borden's cost justification defense was *not* so limited. The Borden cost study compared costs of sale and delivery to two specific chain store customers, A&P and Jewel, with costs of sale and delivery to *each* of four classes of independents (APTO-Borden pp. 129 and 131, Schedules XXVI and XXVII). The study showed that the differentials between the net prices charged each category of independent store customers were fully cost justified as against the net prices charged each other category of independent store customers. The study further showed that the net prices charged A&P and Jewel were fully cost justified, category by category, with each class of independent store customers.

Furthermore, the statement of the alleged "Question Presented," by assuming that the Borden cost study deals only with average costs to the several classes of customers, overlooks the fact that the Borden cost study contains the basic data as to costs of sale and delivery to each location and to each single customer. (This fact is discussed more fully under Proposition II.) All that was left to be done was to make the arithmetical computations, customer by customer. If such computations had been significant, the

Government was free to make them from the data supplied by Borden. To imply that the Borden study was confined solely to a presentation of *average* costs is to mislead this Court.

C. The "Question Presented" does not arise because Borden's classification of customers was not made "without showing any justification for treating the chains and independents as separate classes of purchasers."

The "Question Presented" set forth in the Jurisdictional Statement assumes that Borden's cost study sought to justify the discounts to A&P and Jewel

> "without showing any justification for treating the chains and independents as separate classes of purchasers" (J.S. 2).

The charge that Borden did not make any "showing" of "any justification" for classifying its two largest customers separately from its other customers is repeated throughout the Jurisdictional Statement by such assertions as (1) that "The cost studies are . . . inherently defective because there is no basis for treating the chains as one class of customers and the independents as another" (J.S. 11); (2) that "Neither Bowman nor Borden established any basis for treating the chains and independents as separate categories of customers" (J.S. 12); and (3) that "the studies do not justify the discriminations based upon a wholly arbitrary distinction between 'chains' and 'independents'" (J.S. 18). These assertions are directly contrary to the record.

Before discussing the showing actually made of the reasons for the classification, it should be noted that classification of customers for purposes of cost justification has always been held proper, since the alternative of justifying costs as between each individual customer would prove so

impracticable as to defeat the Congressional purpose of permitting economies of manufacture, sale and delivery to be passed on to the consumers. Classification on a reasonable basis has been upheld in *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38, 58-59 (8th Cir. 1951); *In the Matter of B. F. Goodrich Company*, 50 F.T.C. 622 (1954); *In the Matter of United States Rubber Co.*, 46 F.T.C. 998 (1950); *In the Matter of Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351 (1948); *In the Matter of Bird & Son*, 25 F.T.C. 548 (1937).

All three of the Government's independent expert witnesses (Taggart, Sawyer, and Taylor) were signatories to the "Report to the Federal Trade Commission by the Advisory Committee on Cost Justification under the Robinson-Patman Act" (herein called "Cost Justification Report" or "C.J.R."). This Report states:

> "Classification or grouping of customers, orders, commodities and transactions has repeatedly been recognized by the Federal Trade Commission as a valid business practice. What this means is that it is not necessary to cost-justify each sales transaction or sales to each individual customer. This is important for cost justification purposes, since if no transaction or customer could be treated as a member of a class or group, the cost of making each individual sale would have to be ascertained. Such refinement would be outside the realm of practicability and would tend to make price uniformity a necessity, regardless of economies of manufacture, sale, or delivery in dealing with certain customers" (C.J.R. 11).

The Government's expert witnesses, Taggart and Sawyer, reaffirmed their agreement with this passage (T.D. 67-68; S.D. 43-44), and Professor Taggart added: "I think I probably wrote that" (T.D. 68).

The sole question therefore is whether, under the facts in the present case, Borden's classification of A&P and

Jewel as a class apart from other grocery customers was reasonable. That a substantial "showing" to support the finding of reasonableness was made is beyond question.

1. **The showing made as to the differences in quantities purchased by A&P and Jewel on the one hand and by the various classes of independent stores on the other was enough in itself to establish the reasonableness of the customer classification.**

Two-thirds of Borden's sales of fluid milk to grocery stores were made to A&P and Jewel. Differences in volume between these and other customers existed not only in total purchases, but also in total amounts delivered per location—The weekly deliveries to the 254 A&P and Jewel stores averaged $768.74 per store, while those to the 80 largest "independents" averaged only $289.59 per store (APTO-Borden p. 126 ¶ 202, and p. 163, Schedule XXXIV). The "differing amounts" in which the sales and deliveries were made thus were so extreme as to constitute without more a "showing" justifying the separate classification of these two customers in order to ascertain whether the discounts granted, in the language of the Clayton Act, made "only due allowance" for differences in the cost of sale or delivery resulting from differences in the quantities purchased.

2. **The showing made as to the differences in the methods of sale and delivery to A&P and Jewel as compared to the various classes of independent stores was also sufficient to establish the reasonableness of the customer classification.**

The record shows many differences between the *methods* of sale or delivery to A&P and Jewel on the one hand and to all other Borden grocery customers on the other:

First. The large majority of "independent" customers pay cash for each delivery, which payment is collected by the routeman (or driver) at the time of delivery and must

be accounted for by him. A&P and Jewel pay weekly on a centralized billing basis (APTO-Borden p. 117, ¶ 185, item 15).

Second. Some "independents," however, purchase on a periodic payment or credit basis. In such cases the routemen make periodic collections at the time of delivery (APTO-Borden pp. 117-118, ¶ 185, items 15-17). However, in the case of A&P and Jewel, all billings are handled centrally (APTO-Borden p. 152, ¶ 244), a single total invoice being given each of the two customers (APTO-Borden p. 154, ¶ 250MD).

Third. In the six years up to and including the cost study, all bad debt losses from store customers had been incurred by extensions of credit to "independents," and none by any "chain store" (APTO-Borden p. 159, ¶ 262). Considerable work is performed with respect to independent stores in obtaining credit ratings, none of which is necessary in the case of A&P and Jewel (APTO-Borden p. 155, ¶ 251).

Fourth. In the case of "independents," whether on a cash or credit basis, the routeman (driver) must compute the sales price of each product purchased, and the total sales price of each delivery, and must enter these computed figures in the sales ticket book. In the case of A&P and Jewel, no such computations or entries are made by the routemen; all extensions are made in the course of the centralized billing operation (APTO-Borden p. 117, ¶ 185, item 14).

Fifth. In the case of "independents," new business is solicited by "solicitors," who also call upon the "independents" to hear complaints, distribute point-of-sale advertising materials, and to follow up on slow collections (APTO-Borden pp. 70-71, ¶ 112MD). These solicitors do *not* call on A&P or Jewel stores to secure or maintain their business (APTO-Borden p. 71, ¶ 113MD).

Sixth. A greater proportion of the time spent by Borden executives and administrative employees on particular customer activities "is spent on problems of independent stores than the sales of such stores bear to the sales of chain stores" (APTO-Borden p. 85, ¶ 151MD). Reasons for this were shown by Borden (APTO-Borden pp. 85-87, ¶ 152MD and ¶ 153MD).

Seventh. The stores operated by A&P and Jewel tend more than independent stores to be concentrated in areas with denser population, reducing truck time between store locations (APTO-Borden pp. 77-78, ¶ 127MD).

Eighth. The A&P and Jewel stores required delivery of milk to places in the store far more accessible than those to which delivery was required by independents (See time allocations, APTO-Borden Schedules XXVI and XXVII).

These facts were clearly sufficient to warrant the separate classification of A&P and Jewel because of "differences in the cost of manufacture, sale, or delivery resulting from the differing *methods* . . . in which such commodities are to such purchasers sold or delivered."

Furthermore, the facts found prove that these differences in the methods and "quantities" by which such milk was purchased resulted in conspicuous differences in cost of sale and delivery.

First. Differences in method of doing business are reflected in the fact that, although the weekly purchases of A&P and Jewel combined totaled $195,262, as against $98,672 for all "independent" stores and $23,167 for the 80 largest independent stores (APTO-Borden p. 163, Schedule XXXIV), the time spent by drivers in assembling the products to be delivered to each store after its requirements had been ascertained totaled 17,856 minutes for A&P and Jewel stores, 23,600 minutes for all independent stores, and 3,635 minutes for the 80 largest independent

stores (APTO-Borden p. 115, ¶ 185, item 7; p. 126, ¶ 202; p. 129, Schedule XXVI; p. 135, Schedule XXVII; p. 163, Schedule XXXIV). This means (1) that substantially less time was spent in this activity in delivering $195,262 of sales to A&P and Jewel stores than was spent in delivering $98,672 of sales to the independents, and (2) that, although sales to A&P and Jewel were 8.4 times as much as total sales to the 80 largest independents, the time spent in this activity was only 4.9 times the time spent at those 80 largest independents. The differences in cost of delivery caused by this factor alone are obviously substantial.

Second. The easier accessibility to point of delivery in the A&P and Jewel stores is shown by a comparison of minutes spent by drivers in carrying milk from their trucks to the designated point of delivery on the store premises. This required a grand total of 11,538 minutes in the case of A&P and Jewel stores, 12,709 minutes in the case of all independents, and 2,041 minutes in the case of the 80 largest independents (same references as above, plus APTO-Borden p. 115-116, ¶ 185, item 8). This shows that this activity took *less* time with respect to the $195,262 of sales to A&P and Jewel than it did with respect to the $98,672 of sales to all independents. Furthermore, although sales to A&P and Jewel were 8.4 times as much as to the 80 largest independents, the time spent on this activity at the A&P and Jewel stores was only 5.6 times that spent at those 80 independent stores.

Third. Another difference in the method of accepting delivery is dramatically illustrated by the relative time spent on the driver activity of stocking and packing merchandise in the store refrigerator. While only 3,367 minutes were spent in the aggregate on this activity in the A&P and Jewel stores, a total of 20,959 minutes was spent performing this function, with respect to half the same vol-

ume, in the independent stores. This activity took 4,866 minutes in the 80 largest independent stores. In other words, although sales to A&P and Jewel were 8.4 times as much as to these 80 largest independents, substantially *less* time was spent on this activity in the A&P and Jewel stores (same references as above, plus APTO-Borden p. 116, ¶ 185, item 11).

Fourth. The necessity of individualizing bookkeeping and collections with respect to both cash and credit sales to independent stores resulted in heavy differentials in costs of delivery. Drivers' time in preparing sales tickets and entering deliveries in route books aggregated 8,878 minutes for A&P and Jewel stores, 22,192 minutes for all independent stores, and 2,831 minutes in the 80 largest independent stores (same references as above, plus APTO-Borden pp. 117 and 118-9, items 14 and 22). In other words, nearly three times as much drivers' time was spent in independent stores in these activities than in the A&P and Jewel stores, although sales to the latter were twice those to the former. Furthermore, although sales to A&P and Jewel were 8.4 times as much as to the 80 largest independent stores, only 3.2 times as much time was spent on these activities.

Fifth. The total minutes of routemen's time spent in direct service to the A&P and Jewel stores was only 83,170, while direct service to the independents consumed 119,427 minutes. Service to the 80 largest independent stores alone consumed 21,231 minutes (*ibid.*). In other words, although A&P and Jewel were buying in the aggregate two bottles of milk for every one sold to the independent stores, the drivers were spending 44% more time serving the independent stores than A&P and Jewel! Even with respect to the 80 largest independent stores, 26% as much time was spent in serving them as in serving the A&P and Jewel stores, while their total purchases were

less than 12% of those of A&P and Jewel. Direct labor charges for delivering milk to these 80 largest independents were thus more than twice as much per dollar of sales as the labor charges in delivering to A&P and Jewel.

The Government's assertion that Borden made no "showing" of "any justification for treating the chains and independents as separate classes of purchasers" thus betrays the fact that the Jurisdictional Statement was written by someone who was unacquainted with the record in the case. Borden *did* in fact make an extensive and thorough "showing."

Since the "Question" which this Court is asked to answer is based on three false assumptions and is not presented by the record, the decision of the district court should be affirmed.

II. THE QUESTIONS OF DETAILED FACT WHICH ARE THE ONLY ISSUES ACTUALLY PRESENTED BY THIS APPEAL ARE NEITHER SUBSTANTIAL NOR LIKELY TO RECUR.

The effort of the Government, by its framing of the alleged "Question Presented," to persuade this Court that an issue of possible importance is presented for decision may be placed in perspective by comparing that "Question" with the "Question Presented" in the Notice of Appeal. The two are markedly different. The Notice recognizes that the only issue raised by the record is a question of detailed fact, by stating the "Question" in the following words:

> "Whether defendants' pricing systems to chain and independent grocery stores can be cost justified under Section 2(a) of the Act, and, if so, whether defendants met their statutory burden of affirmatively showing

that their discriminatory pricing practices were based solely upon differences in cost resulting from the differing methods or quantities in which their products were sold or delivered" (Notice of Appeal p. 8).

The "question" so stated is obviously one solely of fact, involving no problems of statutory interpretation or any other principles of general application. Furthermore, the specific criticisms of the Borden study made in the Jurisdictional Statement involve minor details of the methods employed in this cost study. A decision by this Court upon these detailed fact questions will have no precedent value. A brief review of what the Bordon cost study actually showed will demonstrate that the Government's criticisms are wholly insubstantial.

A. The findings of ultimate fact made by the district court support the conclusion that Borden cost-justified its discount schedule.

The memorandum filed by the district court contains these findings of ultimate fact about the cost justification defenses both of Borden and Bowman:

1. That "the [cost justification] studies of both Borden and Bowman are products of extensive investigations of many customers within given areas, and reflect the bona fide efforts of these defendants to determine differences in cost between various classes of their customers" (J.S. App. 34).

2. That the classification of customers for purposes of cost analysis which each appellee made "is not wholly arbitrary";—in other words, such classification is reasonable (J.S. App. 35).

3. That "I cannot now find that these defendants have determined premises for these studies which are improper";—in other words, the premises of the cost studies were proper (J.S. App. 35).

4. That "defendants have each made a bona fide effort to allocate their costs between different types of wholesale customers" (J.S. App. 35).

5. That "such cost allocation is the sole reason for the alleged price discrimination" (J.S. App. 35).

6. That "the cost studies provide an adequate justification for the difference in prices" (J.A. App. 35-36).

7. That "plaintiff has shown no need for the exercise of the Court's equitable powers" (J.A. App. 38).

These findings of ultimate fact are clearly sufficient to support the judgment of the district court.

B. This Court should not be burdened with the onerous task of reviewing and reappraising the multitudinous stipulated facts to see if they substantially support the district court's findings of ultimate fact.

Under Rule 52(a), F.R.C.P., such findings of ultimate fact "shall not be set aside unless clearly erroneous." The findings of ultimate fact in this case rest, of course, upon the findings of specific fact which consist of the *stipulated* facts set forth in the various pre-trial orders. The Government obviously cannot attack findings of facts which are stipulated. The only possible question for review is whether the stipulated facts provide substantial support for the findings of ultimate fact.

The facts set forth under Proposition I have clearly shown that no substantial question exists as to whether the district court's conclusion that Borden's classification of A&P and Jewel as a separate class was reasonable was adequately supported by substantial evidence.

The question as to whether the stipulated facts support the other ultimate findings as to Borden can only be resolved by a thorough study of a lengthy record embodying

the results of a complex, extensive, and thorough cost justification study. The Jurisdictional Statement fails to point to any compelling reason why this Court should be burdened with the onerous task of reappraising the soundness of the inferences to be drawn from the many thousand items of factual data set forth or summarized in the findings.

C. The Government's criticisms of details of the Borden cost study are without substance since the record supports the ultimate finding that the "premises for these studies" were proper and that the studies represent "a bona fide effort to allocate" Borden's costs "between different types of wholesale customers."

Criticisms of a cost study based upon claims that charges or allocations should have been handled differently are without substance when, as here, there has been "a bona fide effort to allocate costs" as between classes of customers, and the methods employed are consistent with sound accounting principles. This Court has itself recognized the "elusiveness of cost data" (*Automatic Canteen Co.* v. *F.T.C.* 346, U.S. 61, 68). The Federal Trade Commission has pointed out that

> "Cost studies of the sort presented in this matter ordinarily do not afford precise accuracy but must necessarily embrace a number of conjectural factors and allocations. There is inherent in them a reasonable margin of allowable error. Where they are made in good faith and in accordance with sound accounting principles, they should be given a very great weight." *In the Matter of Minneapolis-Honeywell Regulator Co.*, 44 FTC 351, 394 (1948).

The Cost Justification Report, authored in large part by the three independent experts who were called as witnesses by the Government, and stating the views of competent authorities as to sound cost accounting practices, states:

> "Great weight should be given to cost studies made in good faith and in accordance with acceptable accounting doctrines. 'Great weight' should be interpreted as meaning that accounting principles relied on by a respondent should have an evidentiary value superior to an adverse theory of accounting unless the adverse theory is supported by a preponderance of evidence that the principles relied on by the respondent are not sound." (C.J.R. 11).

The courts are in accord. Thus in *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38, 58-59 (8th Cir. 1951), the Court of Appeals stated that a system "adopted in good faith" and a cost study "honestly maintained" which "reflected with substantial accuracy the differences in selling costs between the customers in Class D and those in Classes A and B" was not lightly to be regarded as "inadequate."

In view of the district court's conclusion, well supported by the facts, that the allocations appearing in the Borden cost study were made in good faith, criticisms of the details of these cost studies cannot possibly raise a substantial issue justifying review by this Court.

D. Further, no substantial question could arise on this appeal since the Borden cost study showed that Borden's price differentials were more than cost-justified by any one of four methods of allocating or charging costs.

Borden submitted to the district court four different bases for cost justification based on the data which had been stipulated. Three of them used alternative methods of allocating indirect and overhead costs, and one was based on *direct* costs alone.* The computations as to these four

* All costs were directly charged on a time basis between A&P and Jewel on the one hand and each class of "independent" stores on the other. A few small items were allocated between the four classes of independent stores; no complaint has been or could be made of this feature.

methods appear as Summary Schedules I, II, III, and IV in Borden's Brief to the district court. These schedules cover:

I. "Cost Justification based solely on Direct Costs"

II. "Cost Justification based on allocation of Major Indirect and Overhead Costs on basis of Direct Cost"

III. "Cost Justification on the Basis of Direct Costs Plus Indirect Delivery Costs allocated on the basis of number of deliveries"

IV. "Cost Justification Based on Allocating Both Extra Compensation and Transportation Expenses on the Basis of Volume"

All four computations showed that in every respect the Borden price differentials were *more* than justified by differences in costs.

Actually, Schedule II almost exactly conforms with the allocation method suggested in the Jurisdictional Statement—that "indirect delivery costs and related clerical expenses" are incurred "in proportion to . . . time required to make delivery" (J.S. 16, fn. 9). On this basis, total costs of sale and delivery to the A&P and Jewel stores were 13.23 cents per dollar of sales, and costs to the 80 largest independent stores were 30.51 cents per dollar of sales. (Borden's Brief, Summary Schedule II, opposite p. 62.) A&P and Jewel received 8½% discount, and the 80 largest independents 4%, a differential of 4.50 cents per dollar of sales. A discount differential between these two classes as high as 17.28 cents per dollar of sales (30.51 less 13.23) would have been fully cost justified on this method of allocation.*

* As against the independent receiving no discount, a discount of 64.64% (77.87 less 13.23) rather than 8½% would have been cost justified! Similarly, as against stores receiving 2% discount,

Where a choice of several accounting methods is available in making a cost study (as it often is: C.J.R. 28), the fact that the choice made produces a wider margin of justification than some other method is no basis for setting aside the results:

> "A mere showing that a method other than that used by the respondent would produce narrower cost differences should not serve to overthrow an equally acceptable method used by respondent" (C.J.R. 11).

If this be the case, the fact that price differences can be cost justified by use of any of several methods makes the result so clear as to leave no substantial basis for criticism. As the Government's own expert admitted on cross-examination:

> "If there are alternative methods of allocating a joint or indirect functional cost, exploration of alternative methods using different service units would strengthen the validity of the over-all judgment to be derived from any one of them" (S.D. 79).

Since the Borden cost study proved that the Borden discount schedule was fully cost justified on any one of *four* alternative methods, any contention that the evidence fails to support the district court's finding is clearly without substance.

E. The Government's criticisms of Borden's "method of allocating indirect costs" betrays a lack of awareness of the fact that Borden fully justified its price differentials on the basis of direct costs alone.

The lack of substance to the Government's attack upon the Borden cost study is further demonstrated by the fact

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a discount of 34.96% to A&P or Jewel (46.19 less 13.23 plus 2.00) would have been cost justified; and as against the stores receiving 3% discount, a discount of 24.81% (35.04 less 13.23 plus 3) would have been cost justified.

that the two major criticisms both are based upon a lack of awareness of what the Borden cost study actually showed.*

The first of these criticisms is an attack on Borden's "method of allocating indirect costs" and is the theme of the lengthy footnote No. 9, appearing at page 16 of the Jurisdictional Statement. It is directed to the part of the Borden study which shows what the results would be if certain *indirect* costs were allocated between classes of customers.

The Borden study did in fact attempt, for the sake of completeness, to analyze *all* the costs of sale and delivery, including both indirect costs and overhead. Such indirect costs and overhead costs cannot be charged directly, but must be allocated. The use of "locations" and "stops" as factors to measure the allocation of indirect costs was entirely proper under sound accounting principles—as the

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* Another criticism of the Borden cost study in the Jurisdictional Statement is that the study "admittedly had been prepared for the trial" rather than before the discounts to A&P and Jewel were granted (J.S. 7). Suffice it to say that the Government's own witnesses agreed that "such studies may be made either after the fact or before the setting up of a price schedule" (T.D. 15-16; *cf.* O.T.D. 31-32). The Cost Justification Report expressly points out that "Where a seller is challenged under the Robinson-Patman Act to justify a price differential, the costs to be considered are historical, *i.e.*, actual or retrospective costs" (C.J.R. 10-11), and expressly approves the making of "special studies" *after* complaint (C.J.R. 14). Similarly, "Both the courts and the Federal Trade Commission . . . have liberally accepted data derived from litigation-inspired accounting methods." *Reid* v. *Harper & Brothers*, 235 F.2d 420, 422 (2d Cir. 1956) *cert. den.* 352 U.S. 952. These comments simply reflect a realization that a cost justification defense necessarily must ultimately deal with what actually took place rather than rest upon a guess as to what may take place made before a discount is granted and sales made.

Furthermore, Borden had made prior cost studies which were used by management to fix policies and confirm management's understanding of the cost of selling and delivering milk (APTO-Borden p. 61 ¶ 85MD, 86MD and 88MD).

Government's own expert witnesses admitted (T.D. 78-79, 134-6; O.T.D. 58). But the issue need not be debated, since Borden's study proved that its price differentials were fully justified on the basis of *direct* costs alone.

Direct costs of sale and delivery to A&P and Jewel amounted to 4.43 cents per dollar of sales; direct costs of serving all independent stores amounted to 14.07 cents per dollar of sales; and costs of serving the 80 largest independent stores was 10.52 cents per dollar of sales (Borden's Brief, Summary Schedule I, opposite p. 52). While A&P and Jewel received a discount of only 4.50 cents per dollar more than the 80 largest independent stores, a discount of 6.09 cents per dollar (10.52 less 4.43) would have been fully cost justified.

Cost justification using *direct* costs alone is clearly a proper method of cost justification. In effect it means that indirect and overhead costs are allocated on the basis of dollar sales volume, thus having no tendency to justify cost differentials based on differences in volume or on differences in method of delivery (T.D. 72-73; S.D. 100). Such allocation of *indirect* costs on the basis of "volume of goods delivered" is the very method suggested by the Government itself in the Jurisdictional Statement. (See p. 16, fn. 9, last sentence.)

The Jurisdictional Statement, in criticizing Borden's "method of allocating indirect costs" thus betrays a total lack of knowledge of the facts presented by the record.

F. The Government's criticisms of the Borden cost justification study for its alleged failure to make "any showing" as to the costs of serving individual store customers, betrays a lack of knowledge that the basic data placed in evidence permitted an analysis of the direct costs of serving every individual customer.

The Government asserts that, as between A&P and

Jewel, Borden's defense is "without any showing" that the two companies used "identical" methods or "that the stores of one of the two chains purchased the same average volume of milk as the other;" and further asserts that "there is no basis for determining whether both chains are entitled to the largest discount" (J.S. 17). Similar criticisms are directed to the fact that one or a few individual independents may have purchased more than the average A&P or Jewel store, or required less "services," and were "prejudiced" by being treated as a member of a class (J.S. 17-18).

What the author of the Jurisdictional Statement apparently did not understand is that the Borden study included time study report forms showing time spent daily at each store location, identity of each such store location, and volume delivered to such location (APTO-Borden p. 91-94, Ex. II and III). These report forms were extended and placed in bound folders (APTO-Borden p. 97, ¶ 170 and 171). The bound folders constituted Borden Bulk Exhibit 4 (APTO-Borden p. 99, ¶ 173).

These report forms, as well as the other data of the cost justification study, was, of course, available to the Government. It was a simple matter of mathematical computation for the Government to find out whether the facts were different as between A&P and Jewel, or whether any one or more large independents produced lower costs of sale and delivery than A&P or Jewel. Borden sustained the costly burden of providing sufficient data to answer any of the questions as to which the Government now asserts Borden "made no showing."*

Actually, certain of the summaries made part of the record demonstrate that the sales to A&P and to Jewel

* It is significant that none of the Government's three independent experts made any computations from the basic data supplied by the cost study to support the criticisms which the Government now advances.

were of the same general order of magnitude (RPTO-Borden p. 26; FPTO-Borden, Schedule XXXVI). Again, the Jurisdictional Statement makes a criticism which is wholly unwarranted by the record.

CONCLUSION

The judgment below should be affirmed for two separate reasons.

In the first place, the record as to Borden does not raise the "Question Presented" which the Government's Jurisdictional Statement asks this Court to decide. To accept the appeal on the assumption that such a "Question" was in fact presented would impose an unnecessary burden on this Court and on the appellee.

In the second place, the only possible contentions as to Borden which are open to the Government on the record are contentions which raise purely fact issues. These fact issues are obviously insubstantial.

The questions of fact which are presented by the record arise out of the special facts of the particular cost justification defenses offered by Borden. Not a single issue is involved which is of a type likely to recur in an identical or even similar form in other cases.

We respectfully submit that the decision below should be affirmed on the ground that no substantial question is presented for the decision of this Court.

Respectfully submitted,

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